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February 17, 2000

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

RECEIVED  
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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: **Ex Parte Presentation • CS Docket No. 99-363**  
Implementation of the SHVIA;  
Retransmission Consent Issues

Dear Ms. Salas:

This is written on behalf of the Association of Local Television Stations, Inc. ("ALTV") in response to several of the arguments proffered by EchoStar Satellite Corporation in its Reply Comments in the above-referenced proceeding.<sup>1</sup> Therein, EchoStar persists in urging the Commission to constrain the local television stations' ability to negotiate compensatory retransmission consent agreements and, for all intents and purposes, give satellite carriers a free ride. ALTV respectfully disagrees with many elements of EchoStar's perception of the marketplace and the need for heavy-handed governmental intervention. Therefore, ALTV takes this opportunity to respond to several of EchoStar's more grasping arguments.

At the outset, ALTV notes that EchoStar completely ignores the legal limits on the Commission's authority under Section 325 of the Communications Act, as modified recently by the Satellite Home Viewer Improvement Act of 1999.<sup>2</sup> Congress hardly granted the Commission unbounded authority to intervene in retransmission consent negotiations. Therefore, EchoStar has no business asking the Commission to provide more of a helping hand than Congress provided in Section 325(b).

Second, EchoStar itself implicitly supports the notion that local television stations will be willing, if not enthusiastic, to grant satellite carriers retransmission consent. Indeed, EchoStar argues that local television stations should "be willing to grant their retransmission consent to

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<sup>1</sup>Reply Comments of EchoStar Satellite Corporation, CS Docket No. 99-363 (filed January 21, 2000) [hereinafter cited as "EchoStar Reply Comments"]; *see also* Comments of James N. Dertouzos, prepared on behalf of EchoStar and submitted as an *ex parte* presentation on February 7, 2000. Dr. Dertouzos's conclusions, based on his "preliminary review" of the issues, track those of EchoStar in its reply comments. ALTV also herein replies to EchoStar's recently submitted Supplemental Information, CS Docket No. 99-363 (filed February 11, 2000). *See n.7, infra.*

<sup>2</sup>*See* Comments of the Association of Local Television Stations, Inc., CS Docket No. 99-363 (filed January 12, 2000) at 4-8 [hereinafter cited as "ALTV Comments"].

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satellite carriers on better terms than those enjoyed by cable operators.”<sup>3</sup> ALTV must assume that EchoStar believes what it said and that it made its argument in good faith, but then wonders why EchoStar is worried at all. If its analysis of local stations’ incentives is correct, then its negotiations with local television stations will be a breeze. EchoStar, therefore, has no honest basis for calling on the Commission to do for it what it believes the economic incentives in the marketplace should provide on their own.

In fact, local television stations will have strong incentives to grant satellite carriers retransmission consent.<sup>4</sup> In the starkest terms, *lack of carriage* will have an adverse effect on a station, particularly if competing local television stations in the market are carried. Once the satellite system takes over the input to a viewer’s receiver, any station which is not carried will lose access to that viewer and in all likelihood suffer audience losses.<sup>5</sup> No station, from the largest network “O&O” to the smallest independent UHF station, can compete effectively if its access to the audience is diminished. This fundamental economic reality looms over every retransmission consent negotiation and mocks any notion that local television stations would refuse to negotiate in good faith or fail to reach a reasonable agreement on retransmission consent terms with either satellite carrier.<sup>6</sup>

If any doubt exists about local television stations’ incentives in this regard, one need only consider that retransmission consent disputes between cable operators and local television stations have occurred only on the rarest occasions and invariably have ended in a carriage agreement. More to the point, as the Commission is well aware, DirecTV was able to negotiate retransmission consent agreements with Fox and NBC prior to the enactment of SHVIA and without so much as a casual glance (much less the proverbial “raised eyebrow”) from the Commission.<sup>7</sup>

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<sup>3</sup>EchoStar Reply Comments at 11.

<sup>4</sup>ALTV in the interest of brevity will refrain from attacking EchoStar’s faulty premises at this time. Suffice it to say, the better forum for their arguments is their retransmission consent negotiations with local television stations.

<sup>5</sup>See Joint Explanatory Statement of the Committee of Conference at 10.

<sup>6</sup>Also missing from EchoStar’s equation is local television stations’ desire to promote competition to cable television. See Comments of the Association of Local Television Stations, CS Docket No. 99-363 (filed January 12, 2000) at 10.

<sup>7</sup>*Sixth Annual Competition Report*, CS Docket No. 99-230, FCC 99-418 (released January 14, 2000) at ¶74. Echostar recently submitted “Supplemental Information,” alleging that local television stations have been making excessive demands in retransmission consent negotiations. Supplemental Information, CS Docket No. 99-363 (filed February 11, 2000). Putting aside the obvious point that *negotiations* invariably produce *demands* which one or the other party considers excessive -- no one is inclined to initiate negotiations with a generous offer to the other side --, Echostar’s experience is marked by a curious contrast with that of DirecTV, which has managed to offer local-into-local service in 21 cities, while “not putting up any local channels without retransmission consent or ‘a look in the eye and a firm handshake’ that such

Third, EchoStar mischaracterizes the market in an effort to ascribe bargaining power to local television stations. EchoStar is simply wrong in calling the market for retransmission consent a market of many buyers and a few sellers. Exactly the opposite is true. Echostar's vision of a four network universe is a distortion. The retransmission consent market is essentially a local market.<sup>8</sup> In all but the smallest television markets, the number of sellers (*i.e.*, local television stations) exceeds the number of buyers (MVPDs). Each market *post*-SHVIA will have three major buyers: the local cable system, EchoStar, and DirecTV.<sup>9</sup> On the sellers' side, the number of local commercial television stations will range from as many as 22 to as few as five in the 50 largest markets.<sup>10</sup> In such circumstances, it is not the sellers who can "whipsaw buyers against one another," as EchoStar suggests, but the buyers who can employ the "domino effect" to force local stations into noncompensatory retransmission consent agreements. Local television stations were the victims of this tactic in cable retransmission consent negotiations. Cable operators would negotiate first with the weakest station, exploiting their position to negotiate the most favorable terms (for the cable operator), then "whipsawing" other stations, who could not afford to be left off the system once their competition was being carried.<sup>11</sup> Therefore, EchoStar's attempt to create the impression of a marketplace characterized by numerous buyers and a few sellers lacks any basis in fact.

Finally, ALTV must address EchoStar's preoccupation with its "higher costs" and cable television's "higher" rates for lowest tier "lifeline" service.<sup>12</sup> EchoStar confronts a higher cost

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agreement was imminent." "DirecTV: Local Take Rates Strong," *Daily Update* (February 9, 2000). All of which confirms that Echostar wants the Commission to require broadcasters to give them a free ride or at least sit in judgment as a retransmission consent rate court over every price, term, or condition not to EchoStar's liking.

<sup>8</sup>None of this is to ignore that a satellite carrier may face a more formidable negotiation with a major television network for its owned and operated stations than with the local independent station. The Commission hardly may neglect, however, that nearly as many local commercial television stations are *not* affiliated with ABC, CBS, or NBC, as are so affiliated.

<sup>9</sup>Some markets also may have a wireless cable system or "overbuilder," but relatively few households are so served. Many markets also have multiple cable systems serving different franchise areas, but they compete with each other neither for subscribers nor retransmission consent rights.

<sup>10</sup>These larger markets are the markets in line to receive local-into-local service in the near term. However, even in the top 100 markets, the average number of commercial television stations is 9.9.

<sup>11</sup>The dimension of this concern will grow as satellite penetration increases. One study predicts that DBS penetration will increase to nearly 40 per cent by 2008. "Industry Divided Over Role of SHVIA in Big Dec. DBS Sales," *Communications Daily* (January 7, 2000) at 5-6.

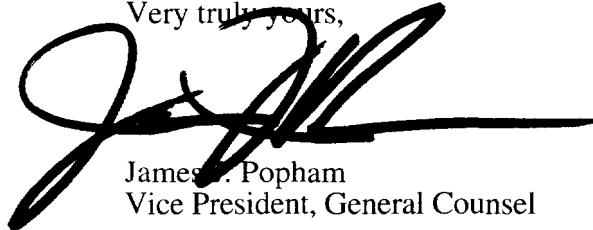
<sup>12</sup>EchoStar Reply Comments at 11-12, 13.

(especially the opportunity cost) than a cable system to carry a local signal because *it has chosen* to provide local-into-local service on a system designed to provide nationwide service. No reason exists to penalize local television stations by forcing them to subsidize EchoStar so as to compensate for the consequences of EchoStar's business decision to use a highly inefficient system. In any event, both EchoStar and DirecTV now reportedly have initiated development and construction of spot beam systems, which are designed to provide local-into-local service efficiently.<sup>13</sup>

EchoStar's implicitly acknowledged (but well publicized) \$4.99 per month rate for local-into-local service versus the District Cablevision's \$11.72 lifeline service charge also has been cited to derail local television stations' efforts to "extract excessive consideration."<sup>14</sup> Again, some perspective is needed. District Cable provides 14 local broadcast station signals (plus PEG channels) in contrast to EchoStar's four major network signals. Furthermore, one might suspect that EchoStar is offering local-into-local at a lower price as a marketing strategy to spur demand and lure away cable subscribers -- and to attenuate the perception that it has deep pockets in its retransmission consent negotiations.<sup>15</sup>

In sum, ALTV sees no reason EchoStar (and DirecTV) will not acquit themselves quite well in retransmission consent negotiations with no more than the minimal nudge from the Commission contemplated by Congress in Section 325(b).

Very truly yours,



James P. Popham  
Vice President, General Counsel

cc: Attached list

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<sup>13</sup>See "DirecTV's Hartenstein Assails EchoStar Suit," *Communications Daily* (February 10, 2000) at 5; "DirecTV Orders First Spot Beam DBS Satellite," *Communications Daily* (December 9, 1999) at 5-6 ("DirecTV announced Wed. That it ordered spot beam satellite from its affiliate Hughes space & communications, action that may be followed by similar news from EchoStar early in coming year, albeit with different vendor, ING Barings satellite industry analyst Robert Kaimowitz said.").

<sup>14</sup>EchoStar Reply Comments at 12.

<sup>15</sup>DirecTV plans to charge \$5.95 and has been loss leading free local-into-local service in several markets. "DirecTV's Hartenstein Assails EchoStar Suit," *supra*, at 5. After the free preview period, "take rates" have exceeded 50% in some markets. "DirecTV: Local Take rates strong," *Daily Update* (February 9, 2000). Still, local-into-local service should become a 100 million dollar a year service from the outset. See "Industry Divided Over Role of SHVIA in Big Dec. DBS Sales," *supra*, at 6. No wonder EchoStar has a market capitalization exceeding 21 billion dollars. *AOL Investment Snapshot - DISH(US)* (February 10, 2000).

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